

**1762 PERSONAL INJURIES: FUTURE LOSS OF EARNING CAPACITY**

(Question \_\_\_\_\_) (Subdivision \_\_\_\_\_ of question \_\_\_\_\_) asks what sum of money will fairly and reasonably compensate (plaintiff) for future loss of earning capacity.

If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question will be the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

**[Where appropriate add the following paragraph:** Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is

exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

#### COMMENT

This instruction and comment were approved in 1998 and revised in 2000 and 2003. This revision was approved by the Committee in October 2021; it added to the comment.

**Burden.** The injured party bears the burden “to establish to a reasonable certainty the damages sustained[.]” Ghiardi, James D., Personal Injury Damages in Wisconsin (1964). “The evidence must be sufficient to enable the jury to estimate with reasonable probability what would have happened had the injury not occurred.” Schulz v. St. Mary’s Hosp., 81 Wis. 2d 638, 657, 260 N.W.2d 783 (1978).

**Determining damages.** Damages for loss of earning capacity are “generally arrived at by comparing what the injured party was capable of earning before and after the time of the injury.” Klink v. Cappelli, 179 Wis. 2d 624, 630, 508 N.W.2d 435 (Ct. App. 1993). Without a showing of evidence, “the jury must speculate or conjecture as to the amount of lost earning capacity.” Klink, supra, at 630, citing Schulz v. St. Mary’s Hosp., 81 Wis.2d 638, 658, 260 N.W.2d 783, 790 (1978). The Wisconsin Supreme Court has held that the jury may not “speculate” when it determines a damages award for loss of future earning capacity. Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis. 2d 354, 364, 166 N.W.2d, 148 (1969).

**Evidence of permanent injury.** “It is true that evidence of a permanent injury may be sufficient in itself for the inference of a loss of earning capacity where the nature of the injury by common knowledge disables the plaintiff from performing the only type of work he or she is fitted to do, but, except in such situation, the fact of injury, standing alone, is not sufficient to establish a loss of earning capacity.” Ianni, supra, at 363, citing Wells v. National Indemnity Co. (1968), 41 Wis.2d 1, 162 N.W.2d 562.

**Loss of Earning Capacity – Business Profits.** Where an injured plaintiff is the owner and operator of a business, the profits of which business are mainly dependent on plaintiff’s personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff’s loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co., 73 Wis.2d 273, 243 N.W.2d 806 (1976).

**Evidence of Future Loss.** See Comment to Wis. JI-Civil 1760. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.